In the Supreme Court of the United States. 1

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,
against
SAMUEL PINE and FREDERICK MULLER,
Respondents. 2

Petition for a writ of certiorari requiring the Circuit Court of Appeals, for the Second Circuit, to certify to the Supreme Court for its review and determination the case of Samuel Pine and Frederick Muller, complainants, against the Mayor, Aldermen and Commonalty of the City of New York, defendant.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York and Bird S. 3
Coler, as Comptroller thereof, respectfully shows to this Honorable Court as follows:

First—The City of New York is a municipal corporation, duly incorporated and existing under and by virtue of its ancient charters and of the Laws of the State of New York, and is the successor of another municipal corporation known as the Mayor, Aldermen and Commonalty of the City of New York. Bird S.

4 Coler is the Comptroller of the City of New York and as such is the chief financial officer thereof.

Second—In the year 1896 this suit was begun in the Circuit Court of the United States for the Southern District of New York, in which Samuel Pine and Frederick Muller, citizens of and residents in the State of Connecticut, were complainants, and the Mayor, Aldermen and Commonalty of the City of New York was defendant.

5 During the pendency of the said action and on the first day of January, 1898, the said Mayor, Aldermen and Commonalty of the City of New York, duly incorporated and existing under and by virtue of its ancient charters and certain laws of the State of New York, was consolidated with other municipalities into, and forming a new corporation known and designated as The City of New York.

6 Said consolidation took place under and by virtue of a certain statute, duly enacted, of the State of New York, known as the Greater New York Charter, and as chapter 378 of the Laws of the State of New York, enacted in the year 1897, which became a law on the 4th day of May, 1897, and took effect on January 1, 1898.

Third—The object of this suit, which was in form a bill in equity, was to restrain the City of New York, its officers, agents, attorneys and employes from continuing to build a dam across the West Branch of the 7 Byram river, and from maintaining, or continuing to maintain the same, and from diverting the water of said West Branch, or any part thereof, and from preventing in any way the water from said West Branch, or any part thereof, from flowing through its natural channel at any time.

Fourth—A motion for an injunction *pendente lite* was denied and said denial was affirmed by the United

States Circuit Court of Appeals for the Second Circuit. The case came on to be heard on testimony before the Hon. Nathaniel Shipman, one of the Judges of the said Circuit Court, who, on July 24, 1900, signed a decree granting a perpetual injunction. 8

Error was duly assigned and an appeal taken to the United States Circuit Court of Appeals for the Second Circuit. The said appeal came on to be heard before said Court in March, 1901, the Court consisting of the Hon. William J. Wallace, the Hon. Edward B. Thomas and the Hon. Hoyt H. Wheeler. The said Court, on October 30, 1901, affirmed the said decree, but the Judges were divided in opinion. The prevailing opinion was written by Judge Thomas, Judge Wallace concurring. A dissenting opinion was delivered by Judge Wheeler, who sustained fully the position taken by The City of New York, through its counsel. 9

Fifth—A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases in the Circuit Courts of Appeal, and the same is marked Exhibit "A." 10

Sixth—Your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals is erroneous and that the dissenting opinion of Judge Wheeler correctly expounds the law, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth section of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being 11

made final in said Circuit Court of Appeals by said act.

Seventh—Your petitioners are advised and verily believe that owing to the erroneous decision of the said Circuit Court of Appeals and to certain novel and peculiar questions of great general public importance, as well of great special and pecuniary importance to The City of New York and to numerous persons interested, such questions should be set at rest by the decision and judgment of this Honorable Court.

And more particularly your petitioners present the following as a brief statement of the situation and why this Honorable Court should review the subject involved in this litigation and make such decision as may be proper, referring for more extended statements and reasons to the record and brief submitted herewith.

A brief statement of the situation is as follows:

The Byram river is a non-navigable stream of fresh water running into Long Island sound at or near the boundary between the States of New York and Connecticut. Tracing its course up stream from the sound, it for a distance forms the boundary between the States of New York and Connecticut, then deflects to the east and for some three or four miles is entirely within the State of Connecticut, through which it flows through or along the side of the two farms belonging to the complainants. On the northerly boundary of one of these farms (Mr. Muller's) the river divides into two branches, the eastern branch being entirely within the State of Connecticut. Following the western branch up stream we soon come again to the boundary line between the States of New York and Connecticut, beyond which line the said western branch, with all its ponds and tributaries, is entirely within the State of New York.

The City of New York has constructed a dam across 16
the west branch of the Byram river and intends to divert a part of the water of that branch into its water supply and to use the same for the public purposes for which water is used in a great city.

This dam is being built entirely within the State of New York, and the part of the said west branch of the Byram river above said dam is also entirely within the State of New York, the waters thereof having their origin or source entirely within the State of New 17
York.

Acting under the authority of an act of the State of New York known as chapter 445 of the Laws of 1877, with its amendments, the City has acquired through the exercise of the right of eminent domain or by private agreement the right to use this water and to divert the same, and has acquired all rights thereto existing in the State of New York.

It has paid all damages for diversion of the said 18
stream in the State of New York, and has expended on the said dam alone about $45,000, and upon other necessary appurtenances thereto, in order to make the said water a part of its water supply, upwards of $1,000,000.

So that now the City of New York owns and has paid for all private lands, rights or interests in, or belonging to said stream of water, so far as the same exist within the 19
State of New York.

The said branch of the Byram River, a short distance below the said dam, crosses the boundary line between the States of New York and Connecticut, and flows for a distance through the State of Connecticut, emptying finally into Long Island Sound.

The said Westerly Branch is joined in the State of Connecticut by an Easterly Branch, which lies entirely within

20 the latter State. The stream thus formed flows through or along the farms of the complainants.

Only about one-fourth of the water flowing through or along these farms can in any event be diverted by the defendants.

It was claimed by the defendant that nothing more than nominal damage could result. But conceding everything that the complainants can assert, the damages to the
21 complainant Pine would not exceed about $2,000 and to the complainant Muller would not exceed $572.50.

Formerly along the said Byram river in the State of Connecticut were certain mills and water powers which were claimed to be damaged by the said diversion of the water. A settlement has been arrived at with all of these mill owners and the sum of $376,000 or thereabouts has been paid to them in satisfaction of their damages.

22 The City through its duly constituted authorities has at all times been willing and anxious to pay to the complainants any damages which they may suffer from the said diversion of the water, and is willing to submit the ascertainment of said damages to any court or judicial tribunal having jurisdiction of such matters and to forthwith pay such sum as such court or tribunal may determine to be just.

The complainants have refused to make any settle-
23 ment of the said matter, or to receive any just and proper sum in settlement, or to submit the question of damages to judicial determination, insisting upon an injunction perpetually restraining the City from diverting the water.

There are numerous other persons similarly situated who also threaten to enjoin the City from the diversion of the said West Branch of the Byram river.

The question thus presented affects far more im- 24
portant matters even than the Byram river diversion.

The City of New York is now or in the near future will be in great need of an additional supply of water which it can get only from certain streams. Several of these streams, however, although having their origin in the State of New York, eventually flow into other States, and if citizens of those States can enjoin the diversion of water from those streams, and can in no manner be compelled to accept compensation in damages, it would 25
be impossible for the City of New York to make use thereof. It thus becomes of great importance to the City of New York that the law shall be settled upon this question, and upon the determination of this general law, as I am informed and verily believe, depends the policy that shall be adopted by the said City in reference to its future water supply.

If the State of New York is absolutely powerless to authorize municipalities existing under its jurisdiction
to make use of streams of water for public purposes, 26
if the same eventually flow into other States after arising and flowing in the State of New York, then the City of New York is greatly restricted as to the sources of its supply, and it can only make use of such streams and sources as are through their entire course within the State of New York.

Your petitioners are informed and verily believe that there is a dispute between the States of Kansas and
Colorado involving similar questions which dispute is 27
now before the Supreme Court of the United States, in a suit between said states in which suit it is expected that argument will be heard before the said Supreme Court on or about February 26, 1902.

Your petitioners would respectfully suggest that the Court order that argument of this suit be had at or near the same time.

Your petitioners are informed and verily believe that the decision of the majority of the Court below is in conflict with certain decisions of the Federal Courts in the First Circuit and with certain decisions rendered by the Supreme Court of the State of Massachusetts, which decisions are discussed at length in the opinion of the Court below and in the brief of petitioners' counsel herewith submitted.

Your petitioners therefore urge that the questions presented should be answered by the highest Court in the land, as a matter of public policy and public interest, it being important that the question be settled as a guide to the City of New York, and other cities similarly situated, and also because of the great pecuniary loss that will result to said City if the said injunction shall remain in full force and effect.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals in the said case therein entitled "Samuel Pine and "Frederick Muller complainants and appellees against "The Mayor, Aldermen and Commonalty of the City "of New York, defendant and appellant," to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or

remedy in the premises as to this Court may seem 32
proper and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court, and your petitioner will ever pray.

Dated New York, December 4, 1901.

The City of New York. [L. S.]

33

BIRD S. COLER,
Comptroller of the City of New York.

STATE OF NEW YORK, }
County of New York, } *ss.:*

Bird S. Coler, being duly sworn, deposes and says: 34

I reside in the City of New York, which is a municipal corporation, incorporated and existing under its ancient charters and the Laws of the State of New York.

I am the Comptroller of said City, and as such the chief financial officer thereof. I have read the foregoing petition, and the same is true of my own knowledge, except as to such matters as are therein stated upon information and belief, and as to those matters I believe it to be true. 35

BIRD S. COLER.

Subscribed and sworn to before me this 4th day of December, 1901.

R. E. SELMES,
Notary Public,
Kings Co., N. Y.

Cert. filed in N. Y. Co.